BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

JOHN CLARKE, Appellant, v. SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL, CONTROL OF THE STATE OF DELAWARE, Agency-Below, Appellee.	)	Appeal No. 2004-09

FINAL ORDER AND DECISION

Pursuant to due notice of time and place of hearing served on all parties in interest, the above stated cause came before the Environmental Appeals Board on Tuesday, May 24, 2005, in the Auditorium, Richardson & Robbins Building, 89 Kings Highway, Dover, Kent County, Delaware.

PRESENT:

Nancy Shevock, Chair

Dr. Stanley Tocker, Member

Peter McLaughlin, Member

Gordon Wood, Member

Harold Gray, Member

Tjark Bateman, Member

Kevin Slattery, Attorney for the Board.

APPEARANCES:
John Sergovic, Esquire, for Mr. John Clarke
David Ormond, Deputy Attorney General, for the Agency

A hearing was held before the Environmental Appeals Board on May 24, 2005, pursuant to Mr. Clarke's appeal of the agency's denial of a wetlands permit and a subaqueous lands lease for the purpose of constructing a wetlands walkway, pier and dock extending from his property, across commonly held, private wetlands and into Vines Creek near Dagsboro, Delaware.

I. Pre-hearing Motion

On its motion *in limine*, the agency contends that the appeal filed by Dr. Maurmeyer has fatal flaws. She appealed the denial of the wetlands walkway only. Mr. Clarke, through counsel, filed an amended appeal letter to expand upon the issues. The appeal, however, is jurisdictional and, therefore, the issues are limited to those from which the appeal was taken. As Dr. Maurmeyer was involved in the *Bowie* case[1], she should have been aware of the discrimination appeal provisions. The appeal letter is not ambiguous. It does not appeal the whole case, just the wetlands walkway.

In response to the motion *in limine*, the appellant contends that Dr. Maurmeyer was not involved in the *Bowie* appeal. She took the agency's determination at face value, and that decision says the subaqueous lands lease determination may not be appealed. In her letter of appeal she notes that the denial of the subaqueous lands lease and "docking facility" were improper. It makes no sense to appeal the denial of the permit for the walkway and not the denial of the lease for construction of the dock and pier. There is evidence of discrimination. In the interests of justice and administrative economy, the

[1]Reference is to the Board's decision dated December 2, 2003 in the matter of *Robert K. Bowie and Joyce L. Bowie v. Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware,* Appeal No. 2003-03.

appeal should include review of the denial of the lease for construction of the dock and pier.

In rebuttal, the agency asserts it has documentation of Dr. Maurmeyer's participation in the *Bowie* appeal. The agency disagrees that the language in the appeal letter includes the discrimination claim.

On questioning by the Board, the agency conceded that its letter to Mr. Clarke was not entirely clear as to his appeal rights. There were no lawyers involved at the time the appeal was filed. If the denial of the pier and dock is not within the jurisdiction of the Board to consider, it is a question as to whether the appellant would be precluded from having a new application considered.

After considering the written and oral arguments of the parties and reviewing the relevant documents, the Board unanimously concluded that it has jurisdiction to consider both the denial of the wetlands permit for the walkway construction and the denial of the subaqueous lands lease for construction of the pier and dock. The Board proceeded to consider the merits of the appeal.

II. Opening Statements

On the merits of the appeal itself, the appellant, John Clarke ("Clarke"), contends that there is no real substantive reason to deny this application when compared to other applications. This is not a pristine marsh--it is covered with mosquito ditches dug in the 1930's. There are also seven (7) similar docks on the opposite side of the development.

On the merits of the appeal itself, it is the agency's contention that there are three areas of marshland in the Point Farm development. One is on the north side of Vines

Creek. It is an "undisturbed" area of marsh. The docks referred to by the appellant are on the south side of Pepper Creek. The second area of marshland where these docks are located is smaller and the applications are older—from 1992, 1996 and 1998. The one application granted in 2002 is for a dock that was sandwiched in between these older docks and there would be a plausible discrimination claim in denying that application. The third area of marshland is in an area where the agency has denied four docks already, so there is a precedent. If they give Mr. Clarke a dock--the first in this area--then it will open the floodgates. This will introduce human activity into this undisturbed marsh. It is consistent with the agency's policy to protect the remaining scarce marshlands in this area.

III. Summary of the Evidence

A. Appellant's Case

1. The Board considered the testimony of Dr. Evelyn Maurmeyer.

Dr. Maurmeyer testified that she has testified as an expert witness before the Board. She has not testified as an expert in court. She has also testified before a Board in Sussex County. She has a B.A. degree in geology and a Ph.D. in geology and coastal environment. She has been employed by Coastal and Estuarine Research, Inc. since 1981. Approximately 30% of her business is preparing applications for dock approvals. The agency stipulated to her expertise as to the facts of this site.

Dr. Maurmeyer testified that she utilizes the agency's 1999 Guidance Document (hereafter "Guidelines")[2] in preparing her applications for docks and walkways. She uses

[2] This document is entitled *WSLS [Wetlands and Subaqueous Lands Section] Docking Facilities Guidance Document.* It is dated December, 1998, and it was issued on

them to advise her clients whether their projects have a "high" chance of approval. She utilized them for Mr. Clarke's project. They selected walkway dimensions of three feet in height and 180 feet in length--within the parameters of the Guidelines. They positioned the walkway so that it will receive morning and evening light. This project meets all the requirements in the Guidelines. She assumes it will be constructed using the standard CCA (chromated copper arsenate) treated timber. She did note "salt-treated" wood in the application. Creosote is the only type of lumber that is prohibited. Plastics are preferred over CCA treated lumber. She obtained written approval from the Point Farm Home Owner's Association ("HOA") to construct the walkway.

With reference to the agency's permit review memorandum for this project ("memorandum")[3], Dr. Maurmeyer testified that she concurs with the agency's finding as to the type of marsh vegetation at the site. Dr. Maurmeyer testified that the type of marsh grass identified in the 1984 Army Corp of Engineers ('ACE") report is different from the marsh grass at this site. It is a different type of wetlands system: one that is not subject to daily tidal ebb and flow. This reference is not in the Guidelines. She did not see any other references to published reports in the agency's memorandum.

As to the memorandum's findings as to habitat value, Dr. Maurmeyer testified that there is no scientific documentation supporting the claim that the increase in human presence on the marsh will disrupt normal breeding and feeding cycles of birds and other animal species. The predators on the marshes co-exist with a human presence. They would be present regardless of the walkway. She is not familiar with any scientific data

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January 28, 1999. It has been introduced in this matter as appellant's Exhibit #2.

that either confirms or denies the existence of an issue with domestic cats being predators with easier access due to the walkway.

Furthermore, the area of marsh where the Clarke property is located is already dissected by a series of mosquito ditches. These were probably dug manually by the CCC in the 1930's, and they have remained open. There are no docks in this area; however, in the past two years she has obtained permits for four properties on Vines Creek that cross wetlands. They are fifty feet in length or less. All the relevant walkways that were approved were also three feet in height.

Dr. Maurmeyer testified that Phragmites is present in the wetlands currently. This is due to the ditch spoils being placed on the sides of the ditches and increasing the elevation of the marsh. She did specifically note it at this site. She agrees there are effects of CCA treated lumber. They can be minimized depending upon the level of treatment. She has no personal knowledge of this, but it is her understanding based upon conversations with contractors. As regards to the docks on Pepper Creek for which she prepared applications, she cannot state that they all contain the same level of CCA; however, she did apply to use standard materials.

As to the aesthetic effect, Dr. Maurmeyer testified that it is a subjective element of the analysis. As to the effects on neighboring land uses, Dr. Maurmeyer testified that it is speculative as to whether the approval of an application will provide an impetus for others to apply for walkways and docks. Mr. Clarke has lived at his residence since 2003. The application was made in 2004. The agency discourages "speculative" applications where

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[3] This document is identified at Tab #4 of the Board's Chronology.

docking facilities are applied for in the absence of a residence at the site. Mr. Clarke's lot is the closest to the waterway of the lots on this area of Vines Creek. There are two walkways on the Pepper Creek side that are the same length (180 feet) and width (3 feet). These are lots 36 (the Fox property—application submitted in1998) and 38 (the Muldoon property—application submitted in1996). They were both new applications.

Dr. Maurmeyer testified that lots 45 (the McCormick property—application submitted in 2003 for a 137 feet walkway), 46 (the Bowie property—application submitted in 2002 for a 210 feet walkway), and 50 & 51 (the Brown and Muldoon properties—application submitted in 2003 for a 300 feet shared walkway), were denied. All these applications consisted of walkways that were three feet wide and three feet in height). There has been no change in the agency's Guidance Document during this time. Lots 38 through 44 were approved for docks on the same wetland area contiguous to lots 45 through 51. Lots 38 through 44 were approved between 1996 and 2002. The longest was approved in 1996 for 180 feet, and the most recent was approved in 2002 approximately 130 feet.

As to the memorandum's comment regarding "undesirable cumulative impacts", Dr. Maurmeyer testified that this is the first dock in this area. Therefore, there is no collective effect. The rest is speculative and premature as to whether additional structures would be built. Admittedly, once people purchase waterfront property, they will desire access. With regard to the comprehensive plan, new docks and walkways are not prohibited; however, the objective is to achieve a balance between recreation and minimizing adverse environmental impacts. The Guidance Document gives clear criteria to help her advise her clients. She is aware of some work done in New Jersey that ties in bird-watching to the

economics of a region, but this is a private property. There is not much revenue to be lost or gained from constructing a walkway over private property. There is a displacement of 21.7 square feet of wetlands due to the pilings. She finds there will be some short-term impacts shortly after the structure is built because the contractors have to be on the marshland during construction. This tends to be temporary.

As to economic impacts, Dr. Maurmeyer testified that she is not aware of any empirical data. She explored the possibility of a community marina at Point Farm, but there was no community access to the waterway for such a structure.

The subaqueous lands analysis is essentially the same as the wetlands analysis. It is primarily subjective.

On cross examination, Dr. Maurmeyer testified that she is aware that not every project in compliance with the Guidelines will be approved. She knows the person who signed the HOA approval for this project. He is the president of the HOA, and he told her that he was the president. The walkway would start on approximately ten feet of Mr. Clarke's uplands property. She is not aware of whether the architectural committee of the HOA approved this project.

On further cross-examination, Dr. Maurmeyer testified that smooth cordgrass typically grows in the sunlight. It can grow in partially-shaded areas. Her comments related to the cordgrass at the University of Delaware site are based upon visual observations of the above-ground biomass. As to the mosquito ditches, she cannot testify as to how much they may have filled in since the 1930's. For some viewers, docks can add to the aesthetics of an area. There is no quantitative standard to measure aesthetic

impacts. The report cited by the ACE discusses shading on smooth cordgrass. For smooth cordgrass, the recommended height is 3.5 feet or greater. Walkways do negatively affect smooth cordgrass. She agrees that there is a high value to marshes. There is disagreement in the scientific community as to the effects of human development on providing access to predators. She believes that marsh areas on Vines Creek are comparable to those on Pepper Creek, because you are comparing the crossing of 180 feet of marsh regardless of location.

On questioning by the Board, Dr. Maurmeyer testified that she monitors a 2 feet high walkway on Canary Creek at the University of Delaware--College of Marine Science. The smooth cordgrass (*Spartina alterniflora*) underneath the walkway is "flourishing". This walkway has been in place since 1980. The mean low water depth at the end of the proposed dock and pier is 2 feet. After 70 some years, the mosquito ditches have to an extent taken on the natural functions of guts and pools in the marsh. There is some Phragmites near the uplands area. The dominant feature is the smooth cordgrass. There is not a dredge channel in Vines Creek as there is in Pepper Creek. Otherwise, the creeks are essentially similar in terms of wetlands.

2. The Board considered the testimony of John Clarke.

Mr. Clarke testified that he purchased the property in 2002. Prior to 2002 he lived on Staten Island, New York. He is a retired New York City police officer. The home was completed in July of 2003. He has his grandchildren for six to eight weeks in the summer. He uses the dock on the Muldoon's property for crabbing. He would like to use the proposed dock and pier for his canoe and a 14 foot, flat aluminum boat (with a 10 hp

motor). Approximately 15 feet of the walkway would be on his property because of its sloping nature. Approximately 165 feet of the walkway would be over wetlands. As a dues paying member of the HOA, he has an easement to utilize the marsh area with the approval of the HOA.

In reference to the agency's memorandum, the alternative boat launching site is Holt's Landing. It is 6.9 miles from his home. He would have to travel on Route 26 which is a heavily traveled road on the weekends. There are no areas in Point Farm that would house a community marina. The white areas on appellant's Exhibit #7 near the point and to the east of Mr. Clarke's lot are pre-existing homes (pre-Point Farm development). They are not part of the HOA.

On cross examination, Mr. Clarke testified that he has no neighbors opposed to his dock proposal. He does not keep the 14-foot aluminum boat at his home.

B. Agency's Case

3. The Board considered the testimony of Ms Jennifer Johnson.

Ms. Johnson testified that she has a BS in environmental science and an MS degree in wetlands management. She previously worked for an environmental engineering firm conducting phase one site assessments including wetlands. She has also worked doing wetland delineations and permit acquisition. She has worked for WSLS for a little over two years. She considers herself and expert in wetlands ecology. She was accepted as such.

The witness testified that in her analysis she considered the fact the land is owned by the HOA. She considered it in terms of balancing public versus private land uses. She did not weigh it heavily in her decision. Regarding the 1984 ACE report containing the

1983 Kearney report, they use the document to determine the height of docks. The 1983 document does specifically discuss smooth cordgrass. The failure to mention it in the memorandum was primarily an oversight. There is an effect of shading on smooth cordgrass. The effects are a reduction of vegetation density and plant height. This was one factor in the consideration of the application. Many of the items discussed in the memorandum are based upon experience and her education. She visited Mr. Clarke's property. Since the Guidance Document was released, there have been development pressures. As a result, there have been discussions about changing the Guidance Document. She evaluated cumulative impacts based upon what she has seen in various developments. When one neighbor obtains a dock, then the rest want one. The first one in an area sets a precedent. Furthermore, CCA lumber is not in this wetland at present, and typically, this is the material that is used. CCA has a cumulative effect. A walkway is a different type of fragmentation than mosquito ditches. She does not know of any private marshes in Delaware that do not have mosquito ditches. She has had other inquiries about constructing walkways in Point Farm on the Vines Creek side. She met with one contractor about a potential 600 foot walkway.

On cross examination, Ms. Johnson testified that the ACE report does note some deficiencies in the Kearney study. They use a ratio of 1 foot height for 1 foot in length for walkway dimensions. The Kearney report has not been "adopted" by the agency. The 1999 Guidance Document is the only public document available for assistance in the docking facility application process. One of her first projects was the Bowie application. With reference to the Bowie application, her field notes indicate some of the criteria she

considers. The checklist does not take into consideration other documentation she must review or consultation with other agency staff. The older walkway approvals were for structures that were not as long as the one sought in this application. They were approved before her tenure with the agency. There has been no change in the Guidance Document. Information and education within the agency have altered their thinking about wetlands walkways. She is not aware of any formal documentation memorializing this change. The fact this application borders a large expanse of wetlands was a factor in making the decision in this case. Domestic animal access would displace the food source for the natural predators. She does not have any empirical data to support this, but it is based upon scientific common sense. It is supported by studies done on community ecology, her professional experience and education.

The witness further testified on cross examination that the number of permits granted on Pepper Creek will have a cumulative effect. She has walked that marsh and there will be CCA contamination. She is not aware of any "number of pilings per acre" assessment having been done. Local Delaware studies have shown that there is an effect caused by CCA within ten meters from a piling. While there is no cumulative impact from one application for a walkway on this particular marsh, it could have a cumulative impact because it will set a precedent. She has not evaluated the older applications on Pepper Creek. The areas with docks on Pepper Creek border a less expansive marsh. While there are similar issues, it is not as extensive an area to protect.

On re-direct examination, Ms. Johnson testified that she decided to deny the application a couple of weeks after the field notes were taken. She noted an osprey nest

along the area of this marsh.

On questioning by the Board, the witness testified that she has not seen actual impacts in this specific area, but she has seen impacts in other areas. She has seen domestic animals in areas where they normally would not have been able to access. Plastic construction would still cause fragmentation and shading concerns.

4. The Board considered the testimony of Ms. Laura Herr.

Ms. Herr testified that has a B.S. degree in biology and an M.S. degree in environmental science. She has been one of the program managers in the WSLS for the past 10 years. She has been employed with the agency in the WSLS a total of 18 years. Through the delegation of the authority of the Secretary, she is the person in charge of making permit decisions on docking facility applications.

The Guidance Document was created as a result of the proliferation of docks in the 1980's and to provide a minimum standard for applications. It was also meant to be a guide for the mom and pop applicants. The Point Farm represents a microcosm of the inland bays and how the agency has changed its thinking regarding dock permits. It changed with an increase in applications in the 1980's and the development pressures in the 1990's. With the proliferation of the structures and the effects on the marshes, the agency has not issued any permits for walkways over 135 feet in the last five years. Most walkway permits are for structures under 100 feet: anything over 100 feet now raises a red flag. On the Pepper Creek side, where there is a dredged channel and a border marsh, there is less value to the marshland. On the Vines Creek side, the marshland has a higher value from the agency's perspective.

On cross examination, Ms. Herr testified that the 1999 Guideline Document is a minimum standard. Walkways up to 300 feet in length are still listed in the Guidelines as potentially compliant structures. The regulations set out the standards for the agency to consider in assessing applications. The Guidelines were established to furnish what it considered to be an interpretation of the regulations. The Clarke application conforms with the Guidelines for the structure dimensions. There are other non-preferential issues such as the use of CCA treated wood and the construction techniques (in this case they were vague and not "top down" specific). When a consultant is utilized, they usually evaluate the application on its face.

On questioning by the Board, Ms. Herr testified that continuous, wide expanses of wetlands are more highly valued by the agency as opposed to fringe wetlands. The agency stopped approving wetland walkways over 100 feet on a statewide basis. Since January 1, 2000, the largest walkway approved was 135 feet long.

IV. Findings of Fact and Conclusions of Law

A. On the Motion in limine

The Board denies the agency's motion *in limine* by unanimous vote.

The Board acknowledges the agency's argument and caselaw to the effect that an appeal to the Board is jurisdictional and that once the appeal period has passed, the Board no longer has jurisdiction to consider the Secretary's decision (in whole or in part). That legal premise is not without exception, however, when the failure to perfect the appeal is due to error on the part of the administrative body from which the appeal is taken. *Cf., Riggs v. Riggs,* 539 A.2d 163, 164 (Del. Supr. 1988)(citing *Bey v. State*, 402 A.2d 362, 363

(Del. Supr. 1979)). Here, the Secretary's designated agent for rendering decisions on wetlands and subaqueous lands matters, misled the appellant with regard to his appeal options and thus directly caused the appeal letter to the Board to purport to be an appeal only of the denial of the wetlands walkway permit.

The Board finds that the December 7, 2004 letter from Ms. Herr to Mr. Clarke was misleading in regard to Mr. Clarke's appeal options. In the last sentence of the final paragraph of her letter, Ms. Herr notes that "[a]ccording to Section 7210 of the Subaqueous Lands Act (7 *Del.C.*, Chapter 72) the *denial of the pier and dock structure on public subaqueous lands* ***cannot be appealed under this act***." (Emphasis added). While the statement itself is accurate, and while the Board is fairly certain that Ms. Herr did not intend to mislead Mr. Clarke, the statement is misleading in that it failed to reference the so-called "discriminatory treatment" exception to 7 *Del.C.* §7210 that is set forth at 7 *Del.C.* §6008(e).[4] The Board further finds the proffer that Dr. Maurmeyer took Ms. Herr's statement regarding Mr. Clarke's appellate remedies (or lack thereof) at face value to be supported in the record. In her letter dated December 22, 2004,[5] Dr. Maurmeyer states: "[i]t is my understanding that denial of the pier and dock on public subaqueous lands cannot be appealed." The combination of the misleading permit denial letter from Ms. Herr, and Dr. Maurmeyer taking the recitation of the appeal rights at face value, caused the appeal letter to be incomplete.

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[4] Section 6008(e) states: "There shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned land including subaqueous lands, ***except*** *an appeal shall lie on the sole ground that the decision was discriminatory in that the applicant, whose circumstances are like and similar to those of other applicants, was not afforded like and similar treatment.*" (Emphasis added).

The agency also contends that as Dr. Maurmeyer was involved in the *Bowie* appeal, she should have been aware of the discriminatory treatment exception when submitting the appeal notice on behalf of Mr. Clarke. The Board's records indicate otherwise. Dr. Maurmeyer filed the application for the Bowies' docking facility, however, she was not involved at any stage of the appeal from the agency's denial of the permit and lease. Moreover, the agency's denial letter in April of 2003 was different from that in the present appeal. It did not contain the additional sentence with the misleading language the Board notes above. Furthermore, neither Dr. Maurmeyer nor her client is an attorney.[6] The Board cannot hold them to the same standard as we would a member of the Delaware Bar: a presumption that they are knowledgeable in the applicable provisions regarding the Board's statutory jurisdiction.

Given the above, the Board concludes that in the interests of justice and administrative economy, it has jurisdiction to consider the entire matter on appeal. Based upon the testimony of Mr. Clarke, the Board finds that it was his intention to construct a wetlands walkway, pier and dock, and that it would make no sense for him to appeal the denial of the wetlands permit only, and not also appeal the denial of the subaqueous lands lease relative to the proposed dock and pier. Once the agency chose to provide Mr. Clarke with a recitation of his appellate rights, it created an obligation to do so clearly. It did not do so in this case. Consequently, the Board denies the agency's motion and accepts the appellant's amended letter of appeal.

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[5] This document is identified at Tab #3 of the Board's Chronology.
[6] As the issue was not formally raised before the Board, we do not address the effect of the fact that the appeal was filed by Dr. Maurmeyer—who is not a member of the

B. On the Merits of the Appeal

The Board affirms the agency's decision by unanimous vote.

Pursuant to 7 Del. C. § 6008(e), the appeal of the denial of the subaqueous lands lease in this matter is limited to the sole issue of whether the decision of the agency in denying the permit application was discriminatory. It is the burden of the appellant to establish that his circumstances are "like and similar" to those of other applicants, and that he was not afforded "like and similar" treatment.

The appellant's case consists primarily of the testimony of Dr. Maurmeyer that: (1) the Clarke's application was consistent with all the requirements of the agency's Guidelines; (2) the marsh area contiguous to Mr. Clarke's property is similar to other marsh areas bordering Pepper Creek; and, (3) the agency has approved similar docks and piers on walkways of similar length along Pepper Creek. Dr. Maurmeyer provided evidence of twelve (12) docking facility applications in the Point Farm development along Pepper Creek that were either approved or denied by the agency between 1992 and 2004. Two of the applications were approved involving walkways of 180 feet in length—the same length proposed in Mr. Clarke's application. One was approved in 1996, and the other was approved in 1998. The most recent applications—totaling three in number (one is a joint application)—were not approved.[7]

The Board concludes that the appellant has not proven he was subject to discriminatory treatment. The agency has been consistent in its efforts since 2000 to preserve open expanses of marsh. The three applications in the Point Farm development

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Delaware Bar—in a representative capacity.

on Pepper Creek that the agency denied in 2003 and 2004 were located on a large expanse of marsh that is smaller in dimensions than the one contiguous with the appellant's property. The agency has also been more restrictive in approving applications for extensive wetland walkways to provide access to docks and piers on state-owned subaqueous lands. Since 2000, no walkway has been approved greater in length than 135 feet. Indeed, all the rejected walkway applications in the area of Pepper Creek noted above were 137 feet in length or greater. The last walkway greater than 100 feet in length was approved in 2002 at 130 feet. This walkway, however, was in an area where the agency had previously approved walkways up to 180 feet in length. The last walkway at that length was approved in 1998—some seven years ago. The agency's philosophy regarding the inland waterways and its wetlands has changed significantly since that time. This is not surprising because, as anyone who has ever lived or visited in this area since 1998 can attest, the development pressures along the inland waterways have been phenomenal. Given this history, the evidence does not support the appellant's contention that he was not afforded "like and similar" treatment to other applicants.

As to the denial of the permit for the wetlands walkway, the standard of review is set forth at 7 *Del.C.* § 6008(b), and requires the appellant to prove that the agency's decision is not supported by the evidence on the record before the Board. The Board concludes that the appellant has not met his burden of proof.[8]

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[7] Only the Bowies appealed the denial of their application to the Board.

[8] The Board realizes that without the dock and pier, a wetlands walkway going to nowhere is likely something the appellant would not have considered. To a large extent, the evidence before us and the analysis of the permit and lease denials in this case must be viewed as a whole. Nonetheless, we address both in our analysis as

Appellant argues in large part that the agency has not been consistent and up front with the public in the application of its regulations. Appellant contends that there was a change in the agency's policies regarding docking facilities between 2001 and 2003 that was not announced to the public. The agency contends that not every situation has to be addressed through the regulation process. Guidance can be provided through case decisions. Furthermore, the agency contends that its Guidance Document cannot be construed as a "cookbook" that will guarantee a certain result. The Board agrees with the agency's position.

First, the Guidelines are just that—interpretive guidance. As they were not issued in accordance with the Delaware Administrative Procedures Act ("APA"), and were not intended to be regulations, they are interpretive guidance which is not controlling upon the Board. Second, the document specifically notes in more than one place that it should not be considered an indicator of approval for structures that conform to the criteria listed therein. While Dr. Maurmeyer used it to advise her clients that compliance would provide a "high" chance of approval, this was clearly not the intended use for the document. Finally, while the agency has not modified the Guidelines, its change in philosophy regarding docking facilities in the inland bays is well documented.

As we noted in the *Bowie* decision, "[t]he courts of this state have recognized the agency's more restrictive application of its statutory authority and regulations with respect to subaqueous lands in the last several years. *See e.g., The Glade v. DNREC*, 2001 WL 845750 (Del. Super. 2001)." The Superior Court's decision cited in *Bowie* is equally

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there are two separate statutory provisions involved as well as somewhat differing

applicable to the agency's consideration of wetlands walkway permit applications. Furthermore, Dr. Maurmeyer was undoubtedly aware of the more restrictive application of the agency's statutory and regulatory authority considering that the three most recent applications she prepared in the Point Farm development were rejected. It is presumed that those applications were also consistent with the criteria contained in the Guidelines. Moreover, all three of those applications would have extended walkways across a similar expanse of marsh. Accordingly, the agency's denial of this application should not have been a surprise to the appellant.

Appellant also contends that the agency has not explained why the permit for the wetlands walkway was denied. The Board finds that Ms. Johnson's memorandum dated December 9, 2004, adequately supports the agency's denial of the wetlands walkway permit.[9] No one in this proceeding disputes the value of tidal wetlands to the ecosystem of the inland bays. The scope of the effect of walkways on marsh vegetation is disputed. The Board is well aware of such effects through years of reviewing these application denials on appeal, and Dr. Maurmeyer admits that walkways do negatively affect smooth cordgrass. While Ms. Johnson may not be as experienced as some of her predecessors, the basic premise of how marsh vegetation grows has not changed. While Dr. Maurmeyer has testified that the primary vegetation, *Spartina alterniflora*, can grow in partial sun, it's normal growing conditions require full sun. Wetland walkways, no matter how well

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burdens of proof.

[9] Overall, the Board found the testimony of the agency's witnesses to be the more credible. Ms. Johnson and Ms. Herr have no particular bias in making their findings as compared to Dr. Maurmeyer who is a paid expert and consultant with a stake in the outcome of this proceeding.

constructed using wood planking, will block sun to a varying extent. Walkways also segment the marshes. Appellant contends this has already occurred because of the mosquito ditching that occurred in the 1930's. Those ditches, however, are not solid, immovable barriers to the same extent as are walkways.

The Board also considered the precedent that the construction of this first walkway would have on this marsh. Appellant contends it will not establish a precedent as this would be the first walkway and it is speculative that other landowners will want similar structures. One look at a set of aerial photographs of the inland bays depicting changes over the last ten years will demonstrate just how little speculation is involved. While there are waterfront owners who purchase such property because they enjoy the vistas provided by expansive wetlands, most owners will readily admit they do so with the desire to have access to the water. Even Dr. Maurmeyer agreed this would be the case. It is not a stretch to imagine that Mr. Clarke will not be alone among his neighbors in his desire to have access to Vines Creek. Mr. and Mrs. Bowie, the McCormicks, the Browns and the Muldoons also had the same desire for their properties along Pepper Creek. Furthermore, even one walkway introduces a human presence on the marsh itself. While there may already be human activity surrounding this area, that activity has not extended to the marsh itself. There is a value to keeping that presence off the wetlands in this area.

The Board also considered the effect of introducing salt treated lumber to this broad expanse of marsh. The negative effects of such lumber on local salt marshes are documented. Dr. Maurmeyer does not dispute this. Considering this and the above factors, the Board concludes that the agency has established a sufficient basis in the

record to support the denial of the appellant's permit application for the wetlands walkway.[10]

V. Statement of Determination

Based upon the foregoing reasons, the Board affirms the decision of the agency denying the appellant's wetlands walkway permit and subaqueous lands lease.

SO ORDERED this 10th day of August 2005.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: July 26, 2005

Nancy Sheveck
Chairman

[10] As the Board has concluded that the appellant has not met his burden of proof with regard to the discriminatory treatment claim, and as the Board has found sufficient evidence on the record before it to support the agency's denial of the wetlands walkway permit, the Board does not address the issue of whether the appellant is a riparian owner.

Environmental Appeals Board
Appeal No. 2004-09

Date: 6/27/05

Stanley Tocker, Ph.D.
Board Member

Environmental Appeals Board
Appeal No. 2004-09

Date: 23 June 2005

Peter McLaughlin
Board Member

Environmental Appeals Board
Appeal No. 2004-09

Gordon E. Wood Sr., Board Member

Date June 30, 2005

Environmental Appeals Board
Appeal No. 2004-09

Date: 6/28/05

Harold Gray
Board Member